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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-504

IN THE MATTER OF THE APPLICATION OF

RICHARD G. THURMER,

Petitioner,

FOR A WRIT OF HABEAS CORPUS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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TOPICAL INDEX

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA	1
OPINIONS BELOW	2
JURISDICTION	2
THE QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	9
REASONS FOR GRANTING THE WRIT	18
1. Denial of Confrontation and Cross-Examination	18
2. Denial of Effective Representation of Counsel	34
3. Perjury Knowingly Used by the Prosecution	47
CONCLUSION	61
ORDER DENYING WRIT OF HABEAS CORPUS filed July 3, 1975	

TABLE OF AUTHORITIES

Cases	Page
Ex Parte Abernathy (1943) 320 U.S. 219	53
Acorta v. Texas (1957) 355 U.S. 28	54
Adams v. United States ex rel McCann (1942) 317 U.S. 269, 143 A.L.R. 435	53
Adamson v. California (1946) 332 U.S. 46	55
Alford v. United States, 282 U.S. 687	27, 29, 31, 43
Breithaupt v. Abram, 352 U.S. 432	60
Campbell v. United States, 352 F.2d 359	34, 43, 44
Coleman v. Alabama, 399 U.S. 1	40
Glasser v. United States, 315 U.S. 60	35, 36, 37, 43
Hamilton v. Alabama, 368 U.S. 52	40
Hurtado v. California, 110 U.S. 516	4, 56, 57, 59
Lebron v. United States, 299 F.2d 16	35

Cases	Page
Mooney v. Holohan, 294 U.S. 103	52
Napue v. Illinois, 360 U.S. 264	54
Olmstead v. United States, 277 U.S. 438	32
People v. Steele, 65 N.Y.S.2d 214	53, 54
Pyle v. Kansas, 317 U.S. 213	54
Rochin v. California, 342 U.S. 165	59
Smith v. Illinois, 390 U.S. 129	27, 28, 43
U.S. ex rel Almeida v. Baldi, 195 F.2d 815	54
United States v. Price, 383 U.S. 787	9
Wynn v. United States, 275 F.2d 648	35

Texts

Black, Hugo, Justice: A Constitutional Faith	60
Black, Hugo, Justice: The Bill of Rights, 35 N.Y.U.L.Rev. 865	60

Texts	Page
Brant, Irving, The Bill of Rights: Its Origin and Meaning	60
Brennan, W., Justice: The Bill of Rights and the States, 36 N.Y.U.L.Rev. 761	60
Crosskey, William W., Politics and the Constitution	57, 58,60
Crosskey, William W., The True Meaning of the Fourteenth Amendment	57
Douglas, W.O., Justice: The Bill of Rights is Not Enough, 38 N.Y.U.L.Rev. 207	58
Douglas, W.O., Justice: Vagrancy and Arrest on Suspicion, 70 Yale L. Jour. 1	60
Flack, The Adoption of the Fourteenth Amendment	60
Kaczorowski, Robert J. 5 Conn. L. Rev. 368	60
Rogge, John O., Searching for the Intent of the Fourteenth Amendment	60
Antieau, Rights of Our Fathers	60
Civil Rights and State Non-Action, 34 Notre Dame Law 303	60

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TO THE HONORABLE, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, RICHARD G. THURMER, respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of California which, on the Third day of July, 1975, denied a Petition for a Writ of Habeas Corpus. Previous to the denial of the Petition by the California Supreme

Court, a petition for the writ had been denied by the Court of Appeal of the State of California, Second Appellate District, Division One. That application had been filed in the Court of Appeal on May 2, 1975 and an application for re-examination and reconsideration was also denied. Copies of all the records in the action comprised of Ten Exhibits accompany this Petition for Writ of Certiorari

OPINIONS BELOW

Copies of two short memorandums issued by the Court of Appeal, but unpublished are available. An accurate copy of these memorandums are appended to this petition as Appendices.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3), §1983, Title 42, U.S.C., §1343, Title 28, U.S.C., §237 of the Judicial Code.

THE QUESTIONS PRESENTED

1. Can a magistrate, presiding in a critical preliminary hearing stage in a criminal case, who blatantly and deliberately ignores the unanimous determinations of this Court on the right to confrontation and cross-examination, after the violations have been brought to the Court's attention together with the decisions applicable, still retain jurisdiction to enter a commitment and call it valid?

2. When two defendants, as here, appeared before the magistrate in a critical preliminary hearing on criminal charges, and both being represented by joint counsel as an economic necessity, and the interests of both defendants were in wide conflict to prohibit a "common cause", does not such magistrate have a jurisdictional duty and responsibility to make an affirmative determination whether or not these two defendants have knowingly and intelligently chosen this kind of representation by joint counsel with the pitfalls which the joint representation <u>may</u> bring about?

3. Does not the perjured testimony of the principle witness for the People, Jimmy Blair, knowingly used by the prosecution not invalidate the commitment?

4. Whether the concept of Hurtado v. California, 110 U.S. 516 (1884) has been so eroded by the later cases to warrant the overruling of that case. It is contrary to the concept of Constitutional Law that a prosecutor may by State statute or State Constitution waive the constitutional right which declares that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Amendment V, Constitution of the United States. This would complete the final phase of incorporating all of the First Ten Amendments into the Due Process Clause of the Fourteenth, and which was the intention of the framers of that Amendment in the first place.

STATUTES INVOLVED

Article VI, §2, Constitution of United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V. Constitution of United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . ."

Amendment VI. Constitution of United States:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense."

Amendment IX. Constitution of United States:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny of disparage others retained by the people.

Amendment XIV. Constitution of United States:

"Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Appropriate Legislation: §1983, Title 42, U.S.C.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Appropriate Legislation: §1343, Title 28, U.S.C.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal

rights of citizens or of all persons within the jurisdiction of the United States."

Appropriate Legislation: §242, Title 18, U.S.C.

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same:

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

Interpretation of above laws by the Supreme Court:

"Under color" of law means the same thing of section 242 that it does in the civil counterpart to section 242, 42 U.S.C. section 1983 (1964 ed.) United States v. Price (1966) 383 U.S. 787, 793 n. 7. "As we have discussed, its language embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United

States." United States v. Price, supra p. 800.

Constitution of California:
Article I, §3

"The States of California is an inseparable part of the American Union, and the Constitution of the United States is the Supreme Law of the Land."

Constitution of California:
Article I, §8

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. . ."

STATEMENT OF THE CASE

Four individuals are involved in this case, Blair, Baspous, Keith and petitioner. The unlawful venture finds its source in the mind of Blair who was operating a unique joint venture with law enforcement officers where he, Blair, would concoct an infamous felony, get others involved in the suggested killing or assaulting a particular victim, then going to the proposed victim and extorting money from him to prevent the

killing or assault, and then turning in his associates in the venture to favored members of law enforcement. These members of law enforcement permitted Blair, despite his violent criminal record of several felonies, to carry a .357 Magnum pistol, that he had been working with the police department as an informer and had always carried the gun. He claimed that the police with whom he operated the joint unlawful ventures would not vouch for him following any arrest because they feared losing their jobs. He also claims that when each case was favorably disposed of, "the police friends would return and even give him back the pistol." All of this information is clearly outlined in a recent probation report dated July 22, 1975, after Blair pleaded guilty to extortion in one of his ventures which backfired on him where the intended victim beat Blair to the wire by informing police officer unconnected with any of Blair's unlawful activities. The probation report on Blair in this unsuccessful venture ends with the recommendation that:

"The fact that he has continued with this type of activity is

frightening. It is felt important that defendant's violence potential be evaluated and, if necessary, that he be removed from the community for a lengthy period of time."

A copy of this recent probation report is made part of this record and marked as Exhibit 10. The transcript of the Hearing in that case is also part of this record and marked Exhibit 9. The purpose is to show the similarity of Blair's operation in every particular. They are not individual crimes but part of a common scheme and plan which originated in Blair's own mind, a scheme which he could not operate without the cooperation of police authorities.

According to the testimony of Blair in the Municipal Court, the defendant Baspous knew Blair as a collector of bad debts, and Baspous being in the business of real estate, it was suggested that they cooperate in this kind of a venture to their economic benefit as Baspous would know people who were owed money. Without describing his method of operation, Blair claimed that he has his own "ways of

getting the money." (H.T. 18:5, Exhibit 1). Baspous was willing to cooperate in the joint venture. He would dig up the clients, Blair would collect the debts, and both would profit. Finally Blair called Baspous on the phone and told him that he needed money, and suggested that Baspous bring up a client (H.T. 20). They set a date for the following night at the Chef's Restaurant in Los Angeles (H.T. 20:18)

At this meeting Baspous told Blair that he had a friend who had also a friend who was owed "a lot of money," some $250,000 in the nature of old coins. Only Blair and Baspous were at this meeting and the meeting was at the solicitation of Blair. A meeting was arranged by Baspous for the following night at the same restaurant. The defendant Keith who was supposed to be owed the money and the petitioner attended this meeting. At this meeting Keith revealed that one Donald Benge owed him the money. Blair testified that there were suggestions at the meeting that Benge should be robbed and killed. Keith gave to Blair Benge's name, address and phone number. Keith said, according

to Blair, "Yes, he said he wanted the money taken. He wanted Benge killed. And he wanted the records destroyed and bring in the money, and it would be split 50-50." (H.T. 9:25-28). This meeting concerned discussions but <u>there was no agreement</u>.

There was another meeting the following evening at Denny's Restaurant in Los Angeles. The same four people attended but there was still no agreement on what kind of action should be taken. Blair's testimony at the preliminary hearing concerning this meeting indicated no agreement had been effected. He said (H.T. 43:5-14):

> "I said well, I need some time, you know. I got to see where the guy's business is at, what he look like and Mr. Keith said he had all types of safes in the place, and Mr. Baspous would cut in and say well, they could be burglarized if they had a certain combination. <u>I don't remember what else was said</u>. He said four or five safes upstairs several safes there altogether."

"Q. Who said that?

A. Mr. Keith."

At this point and time before any agreement was effected, the petitioner, Richard G. Thurmer faded completely out of the picture.

When the meeting in Denny's Restaurant was over, the time had arrived for Blair to put his own private extortion racket into operation under "color" of law, and at a profit which was the original objective in the first instance. But to be on the safe side he first wanted to go to Burbank where Benge resided to ascertain:

> "If there really was going to be a murder, if there was really a Mr. Benge, if there was $250,000 of coins. I wanted to know if this was a police set up. I wanted to find out if this was true." (H.T. 24:9-12)

Blair went to Burbank in June 1974 after the petitioner had eliminated himself from the discussions. Blair met Benge and told him that he had already been paid to kill Benge. As a result he wheedled out of Benge the sum of $1,100

with the promise of greater sums in the future. The Hearing Transcript shows the following:

> "Q. Is that the meeting which you received $1,100?
>
> A. That's the meeting I borrowed $1,100 from Mr. Benge to go in my coin business.
>
> Q. What did you tell Mr. Benge about your experience in the coin business?
>
> MR. WATSON: I will object to this. This is irrelevant.
>
> THE COURT: Sustain.
>
> . . .
>
> A. Like I say we are going to go into business together.
>
> Q. Have you ever been in the coin business?
>
> A. No, I haven't. (H.T. 48)

BY MR. ANDELSON: (To the witness Blair)

> "Q. You indicated you took $1,100 and $3,500 to put down on a building?
>
> A. On the lease of a building. (H.T. 122)"

The testimony given by Blair that the money paid him by Benge was to put Blair in the coin business was deliberate

perjury and it was perjury knowingly used by the assistant prosecutor Watson because Watson had this story checked and found it to be false in 1974. Benge gave the money to Blair to go into the liquor business, not the coin business. Moreover, as recent as July 29, 1975 Burley from the office of the district attorney again contacted Benge and Benge told Burley that "JIMMY (Blair) made a statement to the effect that he could use some money; that he would like to go into a liquor store or a coin business. BENGE stated to BLAIR that it would be impossible to go into the coin business because he did not have the background for it nor the finances. However, BENGE stated that he would lend BLAIR $1,000 if he would go into the liquor business."

Undoubtedly the testimony of Blair about going into the coin business was concocted fiction in which official lawlessness had its part. The prosecution could not allow testimony by a thrice-convicted felon that he enter the liquor business. It is unfortunate that our law enforcement agencies have become so eroded

through some of the members to the extent that such ventures are not only permitted, but encouraged. Cf. United States v. Archer, et al., (2nd Cir. 1973) 486 F.2d 670. For the purpose of economy and this petition, the petitioner will not venture into facts beyond the place and time where he had abandoned all discussions in the transaction. At this point petitioner will proceed with the reasons why this writ should be granted.

REASONS FOR GRANTING WRIT

1. Denial of Confrontation and Cross-Examination

The first denial of confrontation and cross-examination by the Municipal Judge appears in the record of those proceedings at pp. 33-34. The witness was Blair who was, in fact, the sole witness in the case up to the time that the petitioner abandoned all participation in the discussions, and at which time no overt act occurred. The denial was as follows:

CROSS-EXAMINATION

BY MR. VODNOY (Joint counsel for petitioner and Keith)

Q. Mr. Blair, what is your birthdate?

THE COURT: That's irrelevant, counsel.

MR. VODNOY: So I can get a rap sheet.

THE COURT: That's irrelevant, counsel.

MR. VODNOY: I think the background--

THE COURT: That's irrelevant, counsel.

MR. VODNOY: Mr. Blair, where do you reside?

THE COURT: That's irrelevant.

MR. VODNOY: Where do you work? Where are you presently employed?

THE WITNESS: I am self-employed.

* * *

pp. 46-47

BY MR. VODNOY:

Q. Was that the meeting Mr. Benge gave you $1,100?

MR. WATSON: I will object to the word gave.

THE COURT: Objection to the form of the question sustained.

Q. Is that the meeting which you received $1,100?

A. That's the meeting I borrowed $1,100 from Mr. Benge to go in my coin business.

Q. What did you tell Mr. Benge about you experience in the coin business?

MR. WATSON: I will object to this. This is irrelevant.

THE COURT: Sustain.

* * *

p. 50

BY MR. VODNOY:

Q. How is it you know Mr. Burley? (D.A. Investigator)

MR. WATSON: Objection, irrelevant.

THE COURT: Sustain.

BY MR. VODNOY:

Q. Did someone tell you to go to see Mr. Burley?

A. No one told me to go see Mr. Burley.

Q. If you were going to wait until after you talked to Mr. Benge's lawyer and he said it was all hogwash, why did you go to see Mr. Benge?

MR. WATSON: Objection, it's irrelevant.

THE COURT: Objection will be sustained.

BY MR. VODNOY:

Q. What did you tell Mr. Burley?

MR. WATSON: Objection, hearsay.

THE COURT: Objection will be sustained.

* * *

pp. 72-73

MR. VODNOY: I have no further questions other than the questions that I asked that your Honor had sustained the objections to.

THE COURT: What is that supposed to mean?

MR. VODNOY: There is a motion to dismiss on the grounds I am being denied my right of confrontation in regard to Mr. Blair's background.

THE COURT: Counsel, all you have to do is request the People for a rap sheet on this witness, and I am sure they will furnish it to you.

MR. VODNOY: I am not concerned exclusively with his rap sheet but his residence address.

THE COURT: Why are you so concerned about the residence address?

MR. VODNOY: Smith v. Illinois.

THE COURT: Where he lives?

MR. VODNOY: I don't know if he is living at the County Jail or at the -- if the man is a collection man. I think it makes a difference if he is living at the Sierra Towers or in Watts. There are avenues that can be gone into. The Supreme Court has made it clear I can't know where I am going unless I have the answer. I don't know where Mr. Blair lives. My concern is only with respect to perhaps opening an avenue of inquiry on cross-examination. I think the Supreme Court has made it clear that counsel is entitled to get background information regarding the defendant because quite obviously his credibility is in serious question when it comes to Mr. Thurmer.

THE COURT: Counsel, this is not the time for argument.

MR. VODNOY: I am just saying --

THE COURT: The objections were

sustained. They will remain sustained.

The motion to dismiss is denied.

MR. VODNOY: All grounds? With respect to Mr. Benge, my line of inquiry on cross-examination was curtailed by your Honor.

THE COURT: Motion to dismiss is denied.

MR. VODNOY: Strike the witness' testimony.

THE COURT: Motion to strike the witness' testimony is denied.

MR. ANDELSON: For the record, your Honor, for this proceeding I would join in the motions.

THE COURT: Motion denied.

* * *

pp. 91, 100-101

BY MR. WATSON:

Q. Mr. Burley, what is your occupation, sir?

A. Investigator for the District Attorney's Office, Los Angeles County.

. . . . . .

BY MR. VODNOY:

Q. You knew Mr. Blair prior to the day he came in on the 23rd, is that correct?

A. Yes.

Q. When was it that you first became acquainted with Mr. Blair?

MR. WATSON: Objection, it's irrelevant.

THE COURT: Sustain.

MR. VODNOY: Your Honor, I am going to make a motion to strike this witness' testimony on the grounds I have no right to confrontation.

THE COURT: You mumble. I can't hear you.

MR. VODNOY: There is a motion to strike the witness' testimony on the grounds of denial of confrontation. I think this man --

THE COURT: Counsel, you know what remedy you have from the court's ruling. The objection was sustained

and the motion to dismiss is denied, and the motion to strike is denied.

BY MR. VODNOY:

Q. Mr. Burley, did you ever make any attempt to get in touch with Mr. Thurmer?

A. What kind of attempt are you referring to?

Q. Did you ever call him on the phone?

A. No, I did not call him on the phone.

Q. Did you ever instruct Mr. Blair to make any attempt to get in touch with Mr. Thurmer?

A. Not that I recall. There was conversation to the effect that we should have another meeting or additional meetings.

Q. From the minute you got into the case until the minute all the defendants were arrested, did you ever have any meeting or conversation with Mr. Thurmer?

A. No, I did not.

Q. To your knowledge Mr. Blair from the time you got into the case ever have any meeting or conversation with Mr. Thurmer?

A. Not to my knowledge, no.

* * *

p. 123

MR. ANDELSON: My motion goes to -- the People have not produced credible witnesses. The court has been unduly restrictive on the cross-examination of Mr. Blair. I move to dismiss.

THE COURT: Motion to dismiss denied on behalf of Mr. Baspous.

MR. VODNOY: I make the same motion on behalf of Mr. Keith.

THE COURT: Motion to dimiss is denied.

Instead of cluttering up this petition with a heavy barage of the decisions of this Court to sustain the petitioner's plea that the writ of certiorari should

be granted, the petition will merely outline and rely on Smith v. Illinois (1968) 390 U.S. 129 and Alford v. United States (1930) 282 U.S. 687, where in both cases the facts have a striking similarity to those in the instant case. Every Justice in this Court will agree with Dean Wigmore when he strikingly states the absolute essentiality of cross-examination when he wrote that:

> "(Cross-examination) is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However, difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer's experience. * * * If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." (5 Wigmore, Evidence 1367, 3d ed.)

The two cases cited above fact-wise practically identical with the facts in this case should render it an easy task for granting this Writ of Certiorari. The facts in Smith v. Illinois (1968) 390 U.S. 129 which this Court reviewed were simple. The following is from the record of Smith:

"MR. PRIDE: (Defense counsel) Is James Jordan your correct name?

MR. MARWICK: Object.

MR. PRIDE: I have a right to know if it is his correct name.

THE COURT: He may answer if it is his correct name or not.

A. No, it is not.

Q. What is your correct name?

MR. WARWICK: Object.

MR. PRIDE: This is material.

MR. WARWICK: Objection, Judge.

THE COURT: Yes, objection allowed."

Reversing the conviction in Smith v. Illinois, supra, this Court said:

"In the present case there was not, to be sure, a complete denial of the right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open up countless avenues of in-court examination and out-of-court investigation. To forbid this rudimentary inquiry at the threshold is effectually to emasculate the right of cross-examination itself."

This brings us to Alford v. United States (1931) 282 U.S. 687, 689.

MR. FRIEDMAN (Defense Attorney)

"Where do you live, Mr. Bradley? (People's witness)

THE COURT: I cannot see the materiality.

MR. FRIEDMAN: Why, I think the jury has a perfect right to know who the witness is, where he lives and what his business is, and we have the right to elicit that on cross-examination. I may say that this is the first witness the Government had called that they have not elicited the address from.

THE COURT: I will sustain the objection.

Q. Do you live in Los Angeles?

MR. ARMSTRONG: That is objected to as immaterial and invading the Court's ruling.

THE COURT: I have ruled on that question.

MR. FRIEDMAN: I will temporarily pass on to something else. I would like leave to submit authorities

on my right to develop that on cross-examination.

THE COURT: All right.

In reversing the conviction this Court said in Alford v. United States, supra, that:

> "The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question 'Where do you live?' was not only an appropriate preliminary to cross-examination of the witness with his environment, to which cross-examination may always be directed."

The sole purpose of cross-examination, whether in a preliminary examination or in a trial court is for the ascertainment of truth. There is nothing more important at either stage of the criminal proceeding than a thorough cross-examination. Prosecutors, or even courts who restrain this truth-finding procedure in

violation of the Sixth Amendment and the clear-cut unanimous decisions of this Court are involved in official lawlessness. "No distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438, 470. Blair has invented a new breed of procedures for entrapment. In the orthodox entrapment procedures the scheme found its origin in the minds of the law enforcement agents. In this newfangled type of entrapment the scheme finds its source in the mind of the informer. In this way the informer schemes up the crime he will commit for a cut in the loot and during the process he will receive from those he fenagled in as participants some remuneration. He will then go to the intended victim of the crime, tell this intended victim he has been paid to kill him or blow up his business. The victim then pays off to be let alone. After the

pay-off he then goes to his friends in the office of the district attorney, squeals on them that they had solicited him to commit the atrocity, the law enforcement agents allow Blair to keep the money received from the extortion. In fact as Burley testified in the instant case, they do not even question him about it. When the law enforcement agents give Blair a gun and one of his schemes fouls up and he gets arrested by police other than those who are willing to participate in the joint venture, after the matter has been disposed of, the law enforcement agents gives him the gun back. In fact in some instances leniency has been recommended by the assistant district attorney. In the instant case and in others the deputy district attorney claims that Blair is not even an accomplice despite the fact that the atrocity finds its source in Blair's distorted mind.

2. Denial of Effective Representation of Counsel

When the petitioner and defendant Keith appeared before the judge in the municipal court represented by a single counsel, the court had a constitutional duty and responsibility to make an affirmative determination as to whether these two defendants or one of them had intelligently chosen to be represented by the same attorney. This duty is no less mandatory in such a case than if the defendants appeared without counsel at all. In failing this duty and constitutionally imposed responsibility, the municipal court lost its standing as a court of competent jurisdiction. This duty was thoroughly exemplified by the opinion written by Judge Washington in Campbell and Glenmore v. United States (1965) 352 F.2d 359. Judge Washington was joined in that unanimous opinion by Judge Wright and the now Chief Justice of the United States, Mr. Chief Justice Berger where it was said that:

"When two or more defendants are represented by a single counsel,

the District Court has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it.

"The Supreme Court has stressed the importance of having separate counsel representing co-defendants where their interests may not coincide. Glasser v. United States (1942) 315 U.S. 60, 81. In our opinions we have suggested that co-defendants are 'entitled to be represented by separate counsel. ... (if) there was some inconsistency in joint representation.' Lebron v. United States (1955) 299 F.2d 16, 20, cert. denied, 351 U.S. 947 (1956). We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. Wynn v. United States, 275 F.2d 648, 649 (1960). And the Supreme Court has stated that the trial judge bears 'the duty of seeing

that the trial is conducted with solicitude for the essential rights of the accused,' specially the right to effective assistance of counsel. Glasser v. United States, 315 U.S. at 71. The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their

decision was not governed by poverty and lack of information on the availability of assigned counsel. We must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel. Glasser v. United States, supra, at 70. ...If Glenmore had been represented by his own counsel, for example, he might well have cross-examined Campbell on his assertions that he was with Glenmore all through the evening of the robbery.

"We are not setting up a rule that each co-defendant must be independently represented in every case. We hold only that a trial judge has a responsibility to assure that co-defendants' decision to proceed with one attorney is an informed decision. Since the trial judge herein apparently failed to fulfill this responsibility and Glenmore was clearly prejudiced by the fact that he shared an attorney with his co-defendant, his conviction must

be reversed." (Underscoring supplied)

Ground for conflicts of interest in the case at bar were not only potential but actual, and this was well known by the prosecution and the counsel who represented the defendants jointly. We are confronted here with a situation where the evidence as to Keith did "disclose his participation." This was a statement by the attorney for both defendants, and he was aware of this before any hearing was had. He had the facts from the defendants. The transcript of the Hearing at page 112, Exhibit 1, reveals the following:

> "His (petitioner's) role, if any, was a mere preparation. Just conversation, and I don't think there is any demonstration here that Mr. Thurmer has continued on with the conspiracy.
>
> "I also represent Mr. Keith. I do not make that argument in his favor because I think the evidence at this stage does

> disclose his participation. I simply don't see there is evidence other than one meeting prior to the police coming in and prior to any tapings."

The point is that Attorney Vodnoy knew of this conflict when he took on the case as both defendants told him of the roles they occupied. The prosecutor knew also. The glaring point in the case was and is that petitioner left the stage long before any overt act was committed. Listening to discussions does not constitute an overt act and Mr. Vodnoy and the prosecutor know this. It was subsequent to petitioner's abandonment of participation in the discussions that an overt act was committed, such as renting a truck to carry away the loot sought to be seized.

This second question concerning the effective representation of counsel is inextricably bound with that of the first question in the foregoing. This Court has held that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69;

Coleman v. Alabama (1970) 399 U.S. 1. "It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. United States v. Wade, 388 U.S. 218, 227. Applying this test, the Court has held that 'critical stages' include the pretrial type of arraignment where certain rights may be sacrificed or lost, Hamilton v. Alabama, 368 U.S. 52, 54." Coleman v. Alabama, 399 U.S. 1, 8. It has been well established that the guiding hand of effective counsel at the preliminary hearing is essential to protect the accused against an erroneous or improper prosecution as in the instant case exists. Referring again to Coleman v. Alabama, supra, at 9, the Court said:

> "First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced

> lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination."

We are confronted with a situation here where the petitioner had on two occasions was present and probably to some extent participated in some conversations concerning the collection of alleged debts, but where no overt act existed in the suggested process of collecting these debts, and at which point the petitioner faded out of the picture and this is even admitted by the testimony on the witness

Blair. On the other hand we have a defendant Keith who continued with the discussions after petitioner had abandoned the proposition, and continued in an active participation of the proposed scheme. It was after the petitioner had abandoned the discussions that Blair went to see the intended victim, took from this intended victim a large sum of money and then reported the entire matter to his friends in law enforcement as he had intended to do in the first instance as the scheme originated in his mind. In so far as Blair was concerned his plan was a success as intended at the outset. He had accomplished the efficient result of the plan. On the other hand the transaction was a dismal failure to Keith and Baspous. Under the circumstances in this case where the petitioner who had abandoned the early discussions in the matter, and where Keith continued not only in the discussions but in the implementation of what was agreed as the plan, that these two defendants could be effectively represented on a criminal trial concerning the matter would be a preposterous, monstrous

and absurd conclusion. There is not now, and there never has existed in this country any lawyer who could rightfully carry on such joint representative where such wide conflicts of interests existed between two defendants in the same case.

This case reveals far more conflict of interest that the decisions of this Court or law requires to warrant the granting of a Writ of Certiorari. In fact the conflict is so glaring that the writ could be granted and the judgment reversed and the petitioner ordered discharged without the submission of briefs. On the confrontation and right to cross-examination question there is no escape from the decisions of this Court in Smith v. Illinois (1968) 390 U.S. 129 and Alford v. United States (1931) 282 U.S. 687. On the question raised in this second consideration there is no escape from the decision and rulings in Glasser v. United States (1942) 315 U.S. 60 and the case which is practically identical with the instant in Campbell and Glenmore (1965) 352 F.2d 359 in which the Chief Justice of this Court participated in.

The law does not require the showing of an actual conflict. It is enough that the potential for conflict exists because the conflict could be latent as innumerable intangible factors remain unseen. The petitioner can find no case where two co-defendants, even where they were brothers, with economic substance have ever been represented in a criminal case by the same counsel. Counsel for each defendant can employ tactics in the best interest of his defendant, including assault on the other defendant, but he cannot do so if he has to consider the interest of such defendant. Invariably where a potential conflict exists between two defendants represented by the same counsel, especially where conspiracy is charged, it is not what the lawyer does is the vice but what he cannot do is the danger. In Campbell v. United States, 352 F.2d 359, if Glenmore had been represented by independent counsel that attorney, by the very nature of the charge, would have cross-examined Campbell on his assertions that he was with Glenmore all through the evening of the robbery. But the defense counsel, because of the conflict potential was precluded from arguing

that Glenmore's participation was not proved lest it appear that he was entering a claim conceding the guilt of Campbell. Mr. Vodnoy in the instant case dared not make any substantial effort to disassociate the petitioner from the defendant Keith, against whom counsel conceded a more sufficiently legal case. In the case of Keith, there was ample corroboration as required by the accomplice California statute, but in the case of the petitioner there was no such corroboration.

The joint counsel in the instant case was obviously unwilling to stress the differences cited above. Moreover, the judge in the municipal court was determined to protect his scoundrel Blair to keep his whereabouts secret as discussed in the first consideration here. Many illustrations of counsel's dilemma are apparent. It would have been impossible for the attorney for both defendants to suggest that statements allegedly made by petitioner were, in fact, actually made by Keith, and therefore that the petitioner was neither solicitor of the criminal acts nor a conspirator. The record shows that

Blair was a perjuror. He claimed that Benge gave him a large sum of money to go into the coin business while in truth the money, according to Benge, and the district attorney's investigation, was for the purpose of going into the liquor business, and this perjury was knowingly used by the deputy district attorney Watson. Further, it could not be anticipated that the same counsel would have presented a defense in behalf of petitioner when it would in all likelihood strengthen the case against his other client, Keith. For all these reasons, the petitioner was deprived of the effective assistance of counsel, and the commitment order was void and of no force.

3. Perjury Knowingly Used By The Prosecution

Unquestionably, the deputy prosecutor and Blair's investigator friend, Burley were fully aware of Blair's extortion racket. Burley had arrested Blair some two and one-half or two years earlier. But when the defense attorney pursued this further the court struck the record. It went as follows:

BY MR. ANDELSON: (Defense attorney)

"Q. Mr. Burley came in at that last meeting; when did you first meet Mr. Burley?

A. I don't know, two-and-a-half, three years ago.

Q. Did Mr. Burley arrest you at that time?

A. Yes, he did.

MR. WATSON: I am going to make a motion to strike for the purposes of an objection. It is irrelevant.

THE COURT: Motion to strike granted. Objection sustained."

BY MR. ANDELSON:

"Q. Have you been convicted of any felonies, Mr. Blair?

A. Yes, I have.
Q. One or more?
A. More.
Q. What felonies have you been convicted of?
A. Robbery, second degree, carrying concealed weapon. Those are the ones I have been convicted of.
Q. And was that in this state, California?
A. Yes, it was.
Q. Were you arrested under the name of Jimmy Blair?
A. Yes, that's correct.
Q. Do you recall at the last court appearance when the case was continued to today that you saw me walking out of the courtroom and had a conversation with me?
A. Uh-huh, that's correct.
Q. In that conversation did you tell me that you were mad because Mr. Benge hadn't paid you the $5,000 he promised to pay you?
A. No, sir, I did not state that to you.
Q. Did you tell me about the $1,100 at that conversation?

A. No, I didn't mention any money. I said that I was bored with coming to court. I was mad because we didn't get in court. It was not the mention of any money.
Q. Have you received any money from Mr. Benge in the last five days?
A. Have I received any money from Mr. Benge?
Q. Yes.
A. No, I haven't.
Q. Did you tell me at that conversation that Mr. Benge promised you $5,000 to put Mr. Baspous, Mr. Keith, Mr. Thurmer away?
A. Would you repeat that?
Q. Did you tell me that Mr. Benge promised you $5,000 to put Mr. Baspous, Mr. Keith, Mr. Thurmer away?
A. No, sir, I did not state that.
. . .
THE COURT: That conversation were you wired, Mr. Andelson?
MR. ANDELSON: I wish I was, your Honor."

The deputy prosecutor Watson objected to this line of questioning and as usual

the court sustained the objection. (H.T. pp. 29-30, 31)

Throughout all of the direct and cross examination of the People's witness Blair in the Municipal Court, Blair was obliged to stick to the absurd concocted story that the money he received from this Benge and what Benge promised him would be later received was to enable Blair to go into the "coin business" of which Blair was completely ignorant (Exhibit 1, Hearing Transcript, pp. 25, 27, 47, 53, 54). But absurd as this story was, it served the prosecution better for the purpose of injustice than the truth. But now when Blair has been convicted for extortion in a similarly concocted transaction, and it is laid on the record that Blair has been confessed to a series of planned unlawful atrocities in cooperation with state agents as evidenced from his probation report completed on July 22, 1975, outlined in pages 9 and 10, Exhibit 10, the prosecution should change the concocted "coin" story and substitute it with a "liquor business" story that:

> "Benge stated to Blair that it would be impossible to go into the coin business because he [Blair] did not have the background for it nor the finances. However, Benge stated that he would lend Blair $1,000 if he would go into the liquor business."

Here we have an instance where the investigator for the prosecution impeaches the prosecutor's own witness. The point is that the prosecutor knowingly used the perjury in the first instance. Blair's police friend Burley was expressly sent to Benge to procure such an impeachment when it became inevitable that Blair was going to state prison for a long spell despite the recommendations of the deputy prosecutor Watson. Blair can now instigate a "Watergate" in his own small way. It is inherent in his very character and background to so do. Ultimately he will expose all of his joint illegal ventures with the law enforcement officers. The process has already begun in the probation reports. Only the names of the participants are omitted. If we take this recent evidence as true, then Blair's testimony

during the Hearing in the Municipal Court was perjury, and it was perjury knowingly used by the prosecution. The "coin business" story was absurd in the first instance. The "liquor business" story which now replaces the "coin busines" one is equally absurd as by no stretch of the imagination could Blair with several felony convictions legally operate any "liquor business." The true facts might have been adduced, and the perjury exposed, if the judge in the Municipal Court had not hamstrung the efforts of the defense counsel on cross-examination. It is a peculiar quirk this case has taken that officer Burley, the friend of Blair, be sent out to Benge so that Benge could impeach the prosecutor's only witness against this petitioner. The new statement taken from Benge is contained in the record herewith and marked Exhibit 1, at pages 84-85 for this Court's Examination.

There can be no doubt that the facts already available places this case within the purview of Mooney v. Holohan, 294 U.S. 103 (1935), that a violation of due process has occurred where perjured testimony

was knowingly used by state officers in a criminal trial. The fact of this new turn of events only occurred on July 29, 1975, the same day that Blair was arraigned for sentence on the extortion charge. For that reason this matter was not brought before the Supreme Court of California when a petition was made for the writ. However this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law." (Section 1651, Title 28, United States Code. Adams v. United States ex rel. McCann (1942) 317 U.S. 269, 143 A.L.R. 435; Ex parte Abernathy (1943) 320 U.S. 219.

People v. Steele (1946) 65 N.Y.S.2d 214 is illustrative of the finding that perjured testimony was knowingly used by the prosecution officer. The court found, as is quite evident in the instant case, that the assistant district attorney knowingly misled the court to believe that at the time he had seen the witness she was at his office; whereas in fact he had met her in the Hotel Edison. The court held that if these facts had been adduced, the

credibility of that particular witness and other witnesses might have been affected by her answers and this hamstrung the efforts of the defense on cross examination. The Court said: "The defendant was deprived of his right to a fair and impartial trial. Due process of law, which the Constitution guarantees, was denied him." People v. Steele, 65 N.Y.S. 2d 241, 221 (1946). See, also Alcorta v. Texas (1957) 355 U.S. 28; Napue v. Illinois, 360 U.S. 264 (1959). The use of false testimony is by nature the suppression of truth. United States ex rel. Almeida v. Baldi (1952) 195 F.2d 815, 33 A.L.R.2d 1407; Pyle v. Kansas (1942) 317 U.S. 213.

4. Right to be charged by presentation or indictment of a grand jury instead of information is a privilege guaranteed by the Fifth Amendment of the Federal Constitution. Since the California Constitution, Article 1, section 3, adopts the Constitution as "the supreme law of the land," to pass constitutional muster we must read into

Article 1, section 8, which provides that "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information" that a waiver of the Federal right must be express or implied on the record. Otherwise this part of Article 1, section 8, of the California Constitution is void and of no force. The petitioner advances the same claim here in the instant case as did Mr. Justices Murphy and Rutledge when dissenting in Adamson v. California (1946) 332 U.S. 46 at 124-125:

"I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of

due process despite the absence of a specific provision in the Bill of Rights."

In Hurtado v. California (1884) 110 U.S. 516, this Court held that the Due Process Clause of the Fourteenth Amendment did not even require "indictment or presentation of a Grand Jury," in a state prosecution for murder in the first degree. The amazing character of this holding is apparent when one considers what was comprehended by the "Due Process" guarantee in the Fifth Amendment in 1791. In 1786, before either this amendment or the Constitution had been drawn up, Alexander Hamilton observed of the phrase "the law of the land", in the thirteenth article of the Constitution of New York then in effect, that "the best commentators' explained this phrase as meaning 'due process of law;' that is, he said, 'by indictment or presentment of good and lawful men; and trial and conviction in consequence." Hamilton IV, 231-32, The Federalist. Hamilton derived his idea from Sir Edward Coke, one of "the best commentators" he mentioned. It was recognized

then, as it is today that Coke's identification of "due process of law" with the phrase the "law of the land" in Magna Carta, and his definition of both phrases had the significance that Hamilton quoted. See, Politics and the Constitution, Vol. 2, by Crosskey 1104-1105. Chapter XXXI, The True Meaning of the Fourteenth Amendment. Moreover, Rawle, Kent and Story, writing in the 1820's and 1830's, had also recognized that "indictment or presentment by a Grand Jury" was part of the content of the phrase "due process of law," employed in the Fifth Amendment. The distortion by Justice Matthews in his opinion in Hurtado was long and labored; for, after all, it is not an easy task to prove what is not true. Both the Fourteenth and Fifth Amendments were component parts of the same instrument, so the presumption of continuity in meaning and terms in the exact same document was not rebutted. No plainer case subject to the same elementary principles of Supreme Court construction which it had avowed repeatedly, could not then have been imagined. So Justice Matthews took, and the court majority

slavishly accepted. This was a case where the Supreme Court of the United States was at the lowest ebb in its history, and at its worst. Crosskey, Politics and the Constitution, Vol. II, Chapter XXXII, The Supreme Court's Transformation of the Fourteenth Amendment.

Mr. Justice William O. Douglas, if not the greatest, one of the greatest that ever sat in the Supreme Court of the United States or in any court in the world for that matter, posed the question very clearly in 38 New York University Law Review 207, 219 (1963) where he wrote The Bill of Rights is Not Enough. The Justice said:

> "The First Amendment is said to be incorporated into the Due Process Clause of the Fourteenth Amendment. So are the Fourth Amendment, the Just Compensation Clause of the Fifth Amendment; and so are the right to a public trial, protection against cruel and unusual punishment, the right to be free of coerced confessions, and the right to counsel in the more serious criminal cases.

What justification can be made for this selective picking and choosing, bringing some guarantees into Due Process and leaving others out? No convincing answer has yet been made to the position of the first Mr. Justice Harlan in Hurtado v. California 110 U.S. 516, 541 (1884), that what is Due Process in terms of the Fifth Amendment should be Due Process in terms of the Fourteenth.

"Due Process, to use the vernacular, is the wild card that can be put to such use as the judges choose. Those who use it as the wild card often deny doing so, saying that Due Process is not subjective, that it has roots in civilized ideas of ordered liberty. Yet no matter what the judges say, Due Process, as it is presently employed, is fickle and capricious. Its highly subjective and personal character is illustrated by Rochin v. California, 342 U.S. 165 (1952) holding that evidence obtained

by forcible use of a stomach pump on a suspect violates Due Process, and by Breithsupt v. Abram, 352 U.S. 432 (1957) holding that evidence obtained by taking blood from an unconscious person does not."

See, also, Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.Jour. 1 (1960); Mr. Justice Brennan, Jr., The Bill of Rights and the States, 36 N.Y.Un. L. Rev. 761, 778 (1961); Mr. Justice Black, The Bill of Rights, 35 N.Y.Un. L.Rev. 865-881 (1960); Id. A Constitutional Faith (1968); Alfred A. Knopf, New York; Flack, The Adoption of the Fourteenth Amendment (1908); Brant, The Bill of Rights. Its Origin and Meaning; Crosskey, Politics and the Constitution; Rights of Our Fathers, Antieau; Civil Rights And State Non-Action, 34 Notre Dame Lawyer, 303-334; The First and The Fifth, Rogge, O. John; Searching For The Intent of the Framers of the Fourteenth Amendment, Kaczorowski, Robert J., 5 Connecticut L. Rev. 368-398.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully Submitted,

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September 29, 1975

APPENDIX

ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. 18762

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In re THURMER

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

SUPREME COURT
FILED
JUL 3 - 1975
G. B. RICHEL, Clerk

Deputy

I, G. E. [illegible], Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an order made by said Court in the above entitled matter as appears of record in my office.

Witness my hand and the seal of said Court this

day of JUL 3 - 1975

By [illegible] Deputy

Wright
Chief Justice

BEST COPY AVAILABLE